

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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In the matter of:	)	
	)	D.T.E. 99-91-A
Massachusetts Municipal Wholesale Electric Company )	)	
	)	
	)	

**INITIAL BRIEF OF  
READING MUNICIPAL LIGHT DEPARTMENT**

**INTRODUCTION**

Reading Municipal Light Department (“RMLD”) hereby files its brief in opposition to the Massachusetts Municipal Electric Wholesale Company’s (“MMWEC”) request to change the Department of Telecommunications and Energy’s (“Department” or “DTE”) March 24, 2000 Order. Specifically, RMLD opposes MMWEC’s request to eliminate the condition requiring the Department’s review of the MMWEC Amended and Restated General Bond Resolution (“Amended GBR”) prior to the issuance of the bonds. RMLD also requests that the Order and Amended GBR remain as is and not be changed so that the savings from the refinancings are passed on to MMWEC Project Participants, i.e., Massachusetts municipal light plants. RMLD opposes MMWEC’s issuing refinancing bonds on the basis that the Project Participants do not incur any additional debt service costs but that the savings are kept by MMWEC.

While RMLD understands that timing may be an issue, RMLD will consent to a revision to the Department’s Ordering clause. RMLD will agree to a revision which would require MMWEC to submit a final draft of the Amended GBR to the Department at least five (5) business days prior to the

vote of the MMWEC Board of Directors authorizing the issuance of bonds.<sup>1</sup> MMWEC stated that this would be an acceptable solution. See MMWEC Response to DTE RR-4, at p.2. As explained below in this brief, this approach is also consistent with MMWEC's schedule. See MMWEC Response to DTE RR-2 at pp. 5 and 6. This will allow the Department and RMLD to review the Amended GBR before any action is taken to ensure that the Amended GBR is consistent with the public interest standard under St. 1975, c. 775, § 17 and the Department's Order, while also conforming to MMWEC's schedule. See MMWEC Response to DTE RR-2, at p. 5.

### PROCEDURAL HISTORY

On November 1, 1999, MMWEC filed with the Department a petition requesting approval of a comprehensive debt restructuring plan. Massachusetts Municipal Wholesale Electric Company, D.T.E. 99-91, at 1 (March 24, 2000) ("*MMWEC Decision*" or "*Order*"). RMLD moved to intervene in that proceeding and the Department granted RMLD full intervenor status. *MMWEC Decision*, at 1. On January 19, 2000, the Department held a hearing, in which MMWEC presented documentary evidence and the testimony of witnesses, and in which the Department and RMLD examined MMWEC's witnesses. Id.

On March 24, 2000, the Department issued an Order approving MMWEC's debt-restructuring plan, subject to certain crucial conditions. Specifically, the Department conditioned its approval of the refinancing upon receipt and review of the Amended GBR and MMWEC's Board of

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<sup>1</sup> Five days prior to the Board of Directors' vote is the absolute minimum amount of time required for RMLD to review the final draft of the Amended GBR. Additional time also may be necessary depending on the time needed for the Department to review and possibly conduct a hearing on the final draft of the Amended GBR. RMLD, therefore, would request that MMWEC provide the final draft of the Amended GBR in as much time in advance of the MMWEC Board vote so as not to unreasonably impinge on the issuance of the bonds.

Directors' resolution or approval of "any bond, debt, or note refinancing or refunding undertaken pursuant to the Order. See id. at 21-22. The Department's Order states:

FURTHER ORDERED: That the Department's approvals herein are conditioned upon and subject to receipt and review by the Department of the amended and restated General Bond Resolution when approved by the Massachusetts Municipal Wholesale Electric Company Board of Directors; and it is

FURTHER ORDERED: That the Department's approval of this Petition is conditioned upon and subject to receipt and review by the Department of the Massachusetts Municipal Wholesale Electric Company Board of Directors' resolution and approval of any bond, debt, or note refinancing or refunding undertaken pursuant this Department Order.

More than one year later, on May 11, 2001, MMWEC filed a letter with the Department requesting that the Department make certain "technical corrections" to the Order. Among other changes requested by MMWEC, MMWEC sought to eliminate the two conditions requiring the Department's prior review of the GBR and MMWEC Board votes. RMLD objected to MMWEC's request, arguing that MMWEC's request would substantively change the Department's Order and therefore, the proper procedural mechanism to consider MMWEC's request was through a motion to reopen the record pursuant to 220 CMR § 1.11(8) and not through a request for "technical changes."

The Department agreed with RMLD's position. On July 13, 2001, the Department issued a ruling ("*Ruling*") reopening the record pursuant to 220 C.M.R. 1.11(8) to take additional evidence in this proceeding.<sup>2</sup> *Ruling*, at 4. The Department stated, "While MMWEC characterizes its letter as a request for "technical corrections," its request goes far beyond the scope of technical corrections and, instead, seeks substantive amendments to the Department's Order." *Ruling*, at 3. On the same date, the Department issued four record requests to MMWEC and set a procedural schedule allowing

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<sup>2</sup> The Department did not require MMWEC to refile its request in the proper form. Rather, the Department treated MMWEC's request for "technical changes" as a motion to reopen the record.

approximately one week for MMWEC to respond to the Department's record requests – to July 20, 2001, then one week from that date for the parties to submit initial briefs – to July 27, 2001, and another week for the parties to submit reply briefs – to August 3, 2001.

Although the procedural schedule did not address discovery to be conducted by RMLD, RMLD submitted discovery requests to MMWEC on July 17, 2001. On July 20, 2001, RMLD also filed a motion to extend the procedural schedule on the basis that the current schedule does not afford RMLD its rights to conduct adequate discovery and a hearing pursuant to G.L. c. 30A. G.L. c. 30A affords parties a reasonable opportunity to prepare and present evidence, examination and argument, and guarantees that all parties receive “an opportunity for a full and fair hearing.” G.L. c. 30A, §§ 10 and 11.

On July 20, 2001, MMWEC filed responses to the Department's four discovery requests. On July 24, 2001, MMWEC filed a letter in response to RMLD's discovery requests stating that MMWEC either answered RMLD's requests in its response to the DTE's record requests or provided the requested information at a Project Participant's meeting. To date, the Department has not ruled on RMLD's motion.

## ARGUMENT

### **I. MMWEC's Request Should Not Be Granted Without Affording RMLD Due Process.**

As a threshold matter, RMLD renews its motion to conduct adequate discovery and a hearing on the issues in dispute in this reopened proceeding. Given that RMLD was not afforded its rights to discovery and a hearing as required by G.L. c. 30A, RMLD is without sufficient record information to adequately respond to MMWEC's request. To illustrate, MMWEC has resorted to, and RMLD must rely on, certain extra-record evidence to support its position on these new issues. See, e.g., Opposition

of Massachusetts Municipal Wholesale Electric Company to Motion of Reading Municipal Light Department for an Opportunity for Discovery and to Extend the Procedural Schedule (“*MMWEC Opposition*”) (discussing settlement negotiations between MMWEC and RMLD with respect to the initial proceeding as support for MMWEC’s position concerning the review of the Amended GBR); MMWEC Letter, dated July 24, 2001 (stating in response to RMLD-4 that updates to interest rate information was provided at an MMWEC Project Participants’ meeting). Because of the lack of adequate discovery and a hearing, RMLD also must rely on the limited information that it has been able to obtain. Contrary to what MMWEC argues in its July 24, 2001 Opposition, the fact that RMLD is a Project Participant, and therefore, may have the opportunity to obtain some information from or state its views to MMWEC outside of this proceeding is irrelevant to and in no way erodes RMLD’s right to due process under G.L. c. 30A in a matter pending before the Department.

Notably, MMWEC, in its Opposition, does not even challenge the legal basis for RMLD’s motion, i.e., G.L. c. 30A affords parties, such as RMLD, the right to discovery and a hearing. MMWEC misses the mark by arguing that RMLD does not truly view the proposed changes to the Department’s Order as significant. See *MMWEC Opposition*, at 3. As clearly shown in RMLD’s motion and its letters of May 22<sup>nd</sup>, June 1<sup>st</sup>, and June 6<sup>th</sup>, 2001 and in response to MMWEC’s requests for “technical corrections,” clarification, or reconsideration, MMWEC is wrong -- RMLD unquestionably deems and has stated that the issues in question are substantive and significant. Besides, the significance of the proposed changes is relevant as to whether MMWEC’s request can be dealt with as a request for technical corrections without having to reopen the record. The Department already has rejected MMWEC’s position and has ruled that MMWEC seeks substantive changes to the Department’s Order and reopened the record to accept evidence. See *Ruling*, at 3. Because the

Department did reopen the record, RMLD is entitled to due process in this proceeding as required by G.L. c. 30A. Therefore, to the extent that the Department wishes to entertain MMWEC's request to amend the Order, the Department should require additional discovery and a hearing on those issues.

Despite MMWEC's protestations, the issues now before the Department indeed have significance and should not be treated summarily. MMWEC seeks to eliminate the Department's review of the Amended GBR prior to any refinancing undertaken by MMWEC. See MMWEC's Response to DTE RR-1 at 7. Contrary to MMWEC's position, which it still presses in light of the Department's Ruling, MMWEC seeks substantive changes to the Department's Order, which if made, could have a significant adverse effect on RMLD's interests. For the reasons set forth below, the Department should deny MMWEC's request to submit the Amended GBR only *after* the Board of Directors' vote. RMLD, however, will agree to MMWEC's proposal to submit a final draft of the Amended GBR for the Department's review prior to the Board of Directors' vote and urges the Department to continue to require prior review as is set forth in its Order. See MMWEC Response to DTE RR-4, at p. 2.

## **II. The Department Should Require Prior Review of the Amended GBR.**

The Department should reject MMWEC's request to eliminate the Department's prior review of the Amended GBR. The GBR plays a crucial role in how the MMWEC bonds are issued and how the bond funds are used. See MMWEC Response to DTE RR-2 (February 2, 2000) (discussing relationship between GBR and refunding and restructuring of debt). For instance, the GBR is referenced in the Power Sales Agreements between MMWEC and the Project Participants, which MMWEC has unsuccessfully attempted to use to impose significant increases in charges to Project

Participants.<sup>3</sup> Therefore, the GBR will impact MMWEC, MMWEC's Bond Fund Trustee, MMWEC's bondholders and Project Participants, such as RMLD.

Even MMWEC acknowledges the importance and potential impact of the Amended GBR. Indeed, MMWEC stated at the initial proceedings that "[t]he purpose of MMWEC's refunding Petition is to amend and restate its GBR." See MMWEC Response to RMLD Request No. 10(b) (January 14, 2000). Moreover, in the direct testimony of John Wesolowski, MMWEC's Treasurer and chief financial officer, he testifies that the Amended GBR allows, among other things, MMWEC to: (1) sell, lease or otherwise dispose of the properties of any Project, subject to certain criteria which MMWEC, in its sole discretion, determines whether such criteria would be met; (2) invest MMWEC funds; (3) determine whether or not a series of bonds will have debt service reserve and the required balance for that reserve; (4) fund any reserve with a surety bond, insurance policy or letter of credit; (5) use proceeds to acquire property or purchase replacement electric capacity and energy; and (6) enter into amendments to Power Sales Agreements. Prefiled Testimony of Wesolowski, at pp. 12, 14-16; See also MMWEC's Response to RMLD Request No. 2, 3, 4, 5 (January 14, 2000). Furthermore, the Amended GBR has been designed to eliminate the joint pledge of revenues among all of MMWEC's Projects, add flexibility in MMWEC's ability to sell its assets, provide additional operating and financial flexibility and generally would modernize and simplify the provisions of the current GBR. See Testimony of Wesolowski, at pp. 4-5, 9. The Amended GBR also

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<sup>3</sup> For example, rather than obtain a mutually agreed upon amendment to the Power Sales Agreements, MMWEC had unsuccessfully attempted to unilaterally amend the Power Sales Agreements to significantly increase the Project Participants' charges above the actual costs, including debt service, being incurred by the Projects through the GBR, which is not signed by and does not require the approval of the Project Participants.

removes certain reporting requirements to the Bond Fund Trustee and allows MMWEC to remove the Bond Fund Trustee at any time, without cause. See id. At 16. In the initial proceedings, RMLD propounded approximately seven information requests containing several subparts specifically regarding the GBR. The Department propounded approximately eight information and record requests specifically regarding the GBR. Plainly, the Department and RMLD considered the Amended GBR to be a significant issue. It is disingenuous for MMWEC now to claim that the elimination of the Department's prior review of the Amended GBR is not significant.

MMWEC has basically used the same GBR for decades and MMWEC is now, for the first time, seeking to restructure the GBR. This is a significant event, which should not be treated lightly.<sup>4</sup> The GBR submitted to the Department in the initial proceedings was a result of a rigorous process, which involved the input and review of MMWEC, the Project Participants and an outside consultant. See MMWEC Response to DTE RR-2, at pp.1-3. RMLD expected that the version of the Amended GBR submitted into evidence would remain substantially the same, allowing for some possible minor, non-substantive changes typical of any drafting process, and would be used for the refinancing. John Miller, a financial and investment consultant to MMWEC,<sup>5</sup> testified at the hearing that MMWEC did not anticipate any changes to the Amended GBR, but it was possible that because of review of bond insurance companies, large investors or rating agencies, there could be some "refinements" to the terms of the Amended GBR. Tr. at 56-57. MMWEC only reserved its rights to make "refinements." Tr. at

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<sup>4</sup> As indicated above, RMLD did not file a brief on the Amended GBR issue, in part, because RMLD expected that the Amended GBR placed in evidence would be substantially the same as the final version with no significant changes. RMLD merely agreed that so long as the Order contained certain language, RMLD would not oppose MMWEC's going forward and would not appeal the DTE Order. This does not mean that RMLD agreed with everything in the draft Order as proposed by MMWEC.



57. Specifically, Miller testified, “And it is possible – although we don’t necessarily anticipate it – that they might be willing to give us either a higher or lower insurance premium rating were we to make some refinements in the terms of this documents. So we have reserved the right to make changes in those circumstances.” Tr. at 56-57.

The Department’s Order, which conditioned approval on the Department’s review of any refinements to the Amended GBR, gave RMLD needed assurance against any changes to the GBR that could significantly and/or negatively affect RMLD. Because the restructuring is important to the financial interests of Project Participants, such as RMLD, the Department should ensure that MMWEC adopts a GBR, which protects the interests of RMLD and its ratepayers, is in accord with the version of the Amended GBR that MMWEC presented in evidence and is consistent with the Amended GBR upon which the Department issued its Order. To allow MMWEC to submit the Amended GBR after MMWEC issues the Refunding Bonds would not fulfill this goal. At that time, the Department would be without power to take any action and such review would be meaningless since the bonds already would have been issued.

The drafts of the Amended GBR provided by MMWEC in response to DTE RR-4 indicate that substantive changes have been made to the Amended GBR since it was submitted to the Department in the initial proceedings. For example, Section 7.3, subsection (2) of the July 19, 2001 draft reflects a substantive change, which requires explanation and raises several questions. It is unclear what the phrase, “shall be unconditionally assigned” means. Furthermore, it is not self-evident from the language whether a Project Participant that wants to depart from a Project can be prevented from doing so

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<sup>5</sup> John Miller appeared as a witness for MMWEC. Prefiled Testimony of John Miller, at 1. Miller was employed by Public Financial Management, Inc. (“PFM”). *Id.* at 2. PFM provides financial and investment advisory services to

because the remaining Project Participants are unwilling to pay the pro-rata share of the ongoing Administrative and General and Operation and Maintenance costs for the Project which had been paid by the departing Project Participant. This same addition to the Amended GBR also raises the question of whether the remaining Project Participants are obligated to pay for such costs. Since the underlying basis for the Amended GBR was to allow a Project Participant to buy-out of a Project in order to enhance its competitive position, the answers to these questions are crucial.<sup>6</sup> This new language in the Amended GBR has to be explained and understood. This is but another illustration for the need for the Department's review of the final Amended GBR, as well as additional discovery and a hearing on this matter.

RMLD recognizes that timing could be an issue if MMWEC is required to submit the final Amended GBR significantly prior to the refinancing with no set time for Department review. Accordingly, RMLD will consent, with certain modifications, to MMWEC's proposal stated in its July 20, 2001 response to DTE RR-4 to submit a final draft of the Amended GBR to the Department in advance of the vote of the MMWEC Board of Directors. Rather than eliminating the Ordering clause, RMLD requests that the Department revise it to require the following: "MMWEC shall submit the final draft of the Amended and Restated GBR for the Department's review at least five (5) business days prior to the Board of Directors' vote." The final draft of the Amended GBR should be submitted giving as much time as necessary to permit the Department to conduct a meaningful review, which should include a brief hearing, but so as not to hinder the refinancing. Simply providing a copy of the final

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state and local governments. See id.

<sup>6</sup> Given the fact that Section 7.3(1)(a) of the July 19, 2001 draft of the GBR includes unanswered questions in the text, this cannot be the version of the GBR that the Department reviews and gives its acquiescence.

Amended GBR to the Department would be pointless. The Department needs to review the final draft of the GBR to

ensure that it is substantially the same as the draft that MMWEC submitted into evidence at the initial proceedings.

RMLD also suggests that MMWEC be required to provide a blacklined copy comparing the draft Amended GBR submitted into evidence as part of its filing in the initial proceedings and the final draft of the Amended GBR. The Department also should allow RMLD the opportunity to submit comments to the Department on the final draft of the Amended GBR. RMLD requires a minimum of five (5) business days to review and comment on the final draft but would prefer more time if possible. The final draft of the Amended GBR can also be provided to the Department for its review prior to the MMWEC Board vote without interfering with the bond issuance or MMWEC's schedule because the MMWEC Board vote on the Amended GBR is scheduled before the execution of the bond purchase contract.<sup>7</sup> See MMWEC responses to DTE RR-2 at pp. 5 – 6 and DTE RR-3 at p. 3. In MMWEC's responses to DTE RR-1 at p. 5 and DTE RR-4 at p. 2, MMWEC agrees to the approach set forth above as an alternative. RMLD believes that this process will satisfy MMWEC's concerns regarding timing, while protecting RMLD's rights to ensure that the Amended GBR is in RMLD's interest and in the public interest and to make sure that the Amended GBR is in accord with the document that MMWEC placed in evidence and upon which the Department issued its Order.

### **III. The Standard for Issuing the Refunding Bonds Should Be Based on Project Participants Savings and Not Dissavings.**

As set forth in MMWEC's testimony, the Amended GBR and the Department's Order, the public interest standard for issuing the refunding bonds should be based on the Project Participant's (Massachusetts municipal light plants) obtaining savings rather than any dissavings notion. In support,

the Amended GBR submitted by MMWEC to the Department specifically omitted the “no dissavings in any future year constraint” that originally appeared in the existing GBR. See MMWEC Response to DTE 1-8, dated January 14, 2000. In DTE 1-8, the Department asked:

Refer to the testimony of Mr. Wesolowski, page 14, lines 18-20. Please explain in detail why the Amended and restate GBR removes the no dissavings in any future year constraint stated in the Company’s current GBR. In your answer, please describe the other conditions that led to the Company omission of the no dissavings constraint.

MMWEC responded as follows:

The conditions that led MMWEC to omit the no dissavings in any future year constraint are the competitive forces created by the deregulated utility industry and the desire to structure a declining debt service schedule.

MMWEC Response to DTE 1-8. See also MMWEC Response to RMLD Request No. 16, dated January 14, 2000, in which MMWEC concedes that the word “dissavings” is contained in the existing GBR, but not in the Amended GBR.<sup>8</sup>

As MMWEC admits in its *Opposition*, the issue of savings has been a major issue in this case for RMLD. As MMWEC points out:

...ensuring that the allocations of the proposed bonds to the individual MMWEC Projects properly reflects the costs of these projects; that the refinancing only provides for saving and not increased costs for RMLD; and that the amount of the contingency is appropriate is only used to produce savings, and is not used to increased costs to RMLD and is fairly allocated among the Projects.

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<sup>7</sup> Also looking at MMWEC’s schedule presented in response to DTE RR-2, it is apparent that a hearing can now be held without interfering with this schedule.

<sup>8</sup> It is important to note that Mr. Wezolowski did not provide the responses to the Department’s most recent record returns. Mr. Wezolowski was a key MMWEC witness in the initial proceedings. It is also important to note that the individuals, Ronald DeCurzio and Virginia Rutledge, who answered the Department’s most recent record requests have not been sworn in under oath; have not testified in this case; been examined and had their expertise and credibility established in this proceeding. These are but other reasons why a hearing is now requested in the re-opened phase of the proceeding.

*MMWEC Opposition*, at 2, citing RMLD Petition to Intervene, p. 2, ¶ 7 (emphasis added). At the time of the initial proceeding, the interest rate was at a level so that the refinancing might not generate any savings.<sup>9</sup> See Tr. at 44. RMLD also was concerned that if the Department adopted a “dissavings” standard, MMWEC could keep any savings for itself while ratepayers continue to pay debt service charges which were higher than those actually being incurred. As such, in exchange for RMLD’s not filing a post-hearing brief in opposition to MMWEC’s petition, MMWEC agreed that the refinancing would not be undertaken unless there were savings to the Project Participants and the ratepayers. Consistent with the deal between RMLD and MMWEC and the language of the Amended GBR, which in no way precludes that deal, the Department characterized the Amended GBR as requiring savings rather than no “dissavings.”

The Order and Amended GBR should continue to ensure that the MMWEC Project Participants, which principally are Massachusetts municipal light plants serving retail customers, receive the savings from the refinancing. In this era of competition, it is important that savings go to the Project Participants (e.g., municipal light plants) and hence to the ratepayers.<sup>10</sup> This is particularly important now given the fact that interest rates are now lower than the rates that MMWEC relied on in its analyses in the initial proceedings. In any event, MMWEC should not have the ability to retain savings for itself while requiring RMLD, as well as other Project Participants, to pay a charge for debt service which is higher than the actual debt cost being incurred. The Massachusetts municipal light plants and their ratepayers should obtain the savings from this refinancing.

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<sup>9</sup> The Department also expressed an interest in the benefit of the refunding bonds to the ratepayers. At the hearing, the hearing officer asked, “ could you please generally describe what factors are considered and processes are followed by MMWEC to ensure that any refunding of bonds under this petition achieves the best rate of return for consumers and ratepayers?” Tr. at 32 (emphasis added).

<sup>10</sup> See, MMWEC Responses to DTE 1-8 and 1-32 (January 14,2000).

### CONCLUSION

For the foregoing reasons, the Department should reject MMWEC's request to eliminate the Department's prior review of the Amended GBR. RMLD also respectfully continues to request additional discovery and a hearing on the issues raised in the Department's Ruling.

READING MUNICIPAL LIGHT DEPARTMENT,

By its attorneys,

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